HO KEN SENG

v.

PROGRESSIVE INSURANCE SDN BHD

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: B-03(IM)-82-2010]
11 NOVEMBER 2011

BANKRUPTCY: *Capacity of bankrupt - Competency to maintain action - Whether appeals fell within ambit of s. 38(1)(a) Bankruptcy Act 1967 - Whether sanction of DGI required to maintain appeals - Whether test enunciated in Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd applied*

This notice of motion was filed by the judgment creditor ('JC') pursuant to rr. 4 and 76 of the Rules of the Court of Appeal 1994 read with O. 18 r. 19(1)(b) or (d) of the Rules of the High Court 1980 which sought to strike out the appellant's/bankrupt's two appeals, on the ground that the bankrupt had not obtained his discharge and was incompetent to maintain the appeals. The JC raised a preliminary objection that the bankrupt had not obtained the previous sanction of the Director General of Insolvency ('DGI') pursuant to s. 38(1)(a) of the Bankruptcy Act 1967 ('the Act') and so, the bankrupt was legally incompetent to maintain the two appeals. On the other hand, the counsel for the bankrupt submitted that the appeals were lodged pursuant to s. 92 of the Act for the purpose of challenging the bankruptcy orders made against the bankrupt and that the bankrupt was not maintaining an action involving third parties and therefore no sanction was required.

Held (striking out both appeals)
Per Low Hop Bing JCA (majority):

(1) In the event of any inconsistency between s. 38(1)(a) of the Act and s. 92(1), (2) and (3), the specific provisions of s. 38(1)(a) would prevail over the general provisions in s. 92(1), (2) and (3). Hence, if the bankrupt wished to invoke the provisions of s. 92, then the provisions of s. 38(1)(a) shall apply to him. (para 15)

(2) In *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd*, two question arose for determination *ie*, (i) the bankrupt's competency to maintain an action without the previous sanction of the DGI under s. 38(1)(a) of the Act; and (ii) whether an annulment order operated retrospectively. The Federal Court reversed the decision by the Court of Appeal and held that an annulment order operated retrospectively. However, the issue of *locus standi* was left open by the Federal Court, leaving the principles enunciated by the Court of Appeal in relation to the requirement for sanction under s. 38(1) to remain intact. (paras 19-21)

(3) The steps taken by the bankrupt in filing and prosecuting the two appeals clearly came within the ambit of maintaining an action in s. 38(1)(a) of the Act and so attracted the application of the principles set out in relation to s. 38(1)(a) *ie*, the requirement for the previous sanction of the DGI. (para 22)

Per Anantham Kasinather JCA (dissenting):

(1) Azmi J in the case of *Re Khoo Kim Hock* opined that the sanction requirement did not apply to cases where the bankrupt was seeking to challenge an order in bankruptcy or where he was applying to be discharged or where he was seeking the court's discretion, to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The test therefore enabled a bankrupt to challenge all orders made by a bankruptcy court in the exercise of its bankruptcy jurisdiction including appeals, as in this case, and even application to set aside a judgment forming the subject matter of the bankruptcy proceedings without the need to obtain the sanction of the Official Assignee. (paras 30-32)

Bahasa Malaysia *Translation Of Headnotes*

Notis usul ini difailkan oleh pemiutang kehakiman ('JC') berikutan kk. 4 dan 76 Kaedah-Kaedah Mahkamah Rayuan 1994 dibaca dengan A. 18 k. 19(1)(b) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 yang memohon untuk membatalkan kedua-dua rayuan perayu/bankrap, atas alasan bahawa si bankrap tidak memperoleh pelepasan dan tidak kompeten untuk mengekalkan rayuan-rayuan tersebut. JC membangkitkan bantahan awalan bahawa si bankrap

tidak memperoleh sanksi Ketua Pengarah Insolvensi ('KPI') menurut s. 38(1)(a) Akta Kebankrapan 1967 ('Akta') dan dengan itu, si bankrap tidak kompeten dari segi undang-undang untuk mengekalkan kedua-dua rayuan. Sebaliknya, peguam si bankrap berhujah bahawa rayuan-rayuan tersebut difailkan berikutan s. 92 Akta bagi tujuan mencabar perintah-perintah kebankrapan yang dibuat terhadap si bankrap dan bahawa si bankrap tidak membawa tindakan yang mengaitkan pihak ketiga dan dengan itu tidak ada sanksi yang diperlukan.

Diperintahkan (membatalkan kedua-dua rayuan)
Oleh Low Hop Bing HMR (majoriti):

(1) Jika terdapat ketidakkonsistenan di antara s. 38(1)(a) Akta dan s. 92(1), (2) dan (3), seperti di dalam rayuan-rayuan ini, peruntukan spesifik s. 38(1)(a) mengatasi peruntukan am s. 92(1), (2) dan (3). Dengan itu, jika si bankrap ingin membangkitkan peruntukan s. 92, maka peruntukan s. 38(1)(a) terpakai terhadapnya.

(2) Di dalam kes *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd*, dua persoalan timbul untuk penentuan, iaitu, (i) kekompetenan si bankrap untuk mengekalkan tindakan tanpa sanksi awal KPI di bawah s. 38(1)(a) Akta; dan (ii) sama ada perintah pembatalan beroperasi secara kebelakang. Mahkamah Persekutuan mengakas keputusan Mahkamah Rayuan dan memutuskan bahawa perintah pembatalan beroperasi secara kebelakangan. Walau bagaimanapun, isu *locus standi* tidak disentuh oleh Mahkamah Persekutuan, sekaligus mengekalkan prinsip-prinsip yang dibuat oleh Mahkamah Rayuan berkaitan dengan keperluan sanksi di bawah s. 38(1)(a).

(3) Langkah-langkah yang diambil oleh si bankrap dalam memfailkan dan mendakwa kedua-dua rayuan tersebut jelas terangkum dalam pengekalan tindakan di bawah s. 38(1)(a) Akta dan dengan itu menarik pemakaian prinsip-prinsip yang dikemukakan berkaitan dengan s. 38(1)(a) iaitu, keperluan untuk sanksi awal KPI.

Oleh Anantham Kasinather HMR (menentang):

(1) Azmi J di dalam kes *Re Khoo Kim Hock* berpendapat bahawa keperluan sanksi tidak terpakai bagi kes-kes di mana si bankrap memohon untuk mencabar suatu perintah dalam kebankrapan atau di mana beliau memohon untuk pelepasan atau di mana

beliau memohon budi bicara mahkamah, untuk menyemak, membatalkan atau mengubah apa-apa perintah yang dibuatnya di bawah bidang kuasa kebankrapan. Dengan itu, ujian tersebut membolehkan si bankrap mencabar kesemua perintah yang dibuat oleh mahkamah kebankrapan dalam melaksanakan bidang kuasa kebankrapannya termasuk rayuan, seperti di dalam kes ini, malahan permohonan untuk mengetepikan penghakiman yang membentuk halperkara prosiding kebankrapan tanpa keperluan untuk memperoleh sanksi Pegawai Pemegang Harta.

Case(s) referred to:

Amos William Dawe v. Development & Commercial Bank (Ltd) Bhd [1980] 1 LNS 133 FC ***(refd)***

Bathamani Suppiah v. Southern Finance Company Bhd [2000] 2 CLJ 650 HC ***(refd)***

Chin Sin Lan v. Delta Finance Bhd [2002] 1 CLJ 266 HC ***(refd)***

Christopher Tan Kok Ching v. Bolhassan Di (No 2) [1998] 5 CLJ 177 HC ***(refd)***

M/s Laksamana Realty Sdn Bhd v. Goh Eng Hwa [2004] 1 CLJ 274 CA ***(refd)***

Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal [2009] 4 CLJ 34 CA ***(foll)***

Re Chua Tin Hong ex parte Castrol (M) Sdn Bhd [1997] 3 CLJ Supp 174 HC ***(refd)***

Re Gan Wee Kuan, ex p Bank Bumiputra Malaysia Bhd, (Mentakab) [2002] 5 CLJ 113 HC ***(refd)***

Re Khoo Kim Hock [1974] 1 LNS 134 HC ***(foll)***

Re Lim Tai Nian, ex p Kewangan Utama Bhd [2002] 1 CLJ 41 HC ***(refd)***

Re Low Kok Tuan ex p Arab-Malaysian Merchant Bank Bhd [1997] 4 CLJ 185 HC ***(dist)***

Re Mat Sari Hamid ex parte United Asian Bank Bhd [1993] 1 CLJ 202 HC ***(refd)***

Re Sebastion, ex p Metroplex Leasing & Credit Corp Sdn Bhd [1989] 1 LNS 165 HC ***(refd)***

Re Teoh Seow Chiew; ex p Ambank (M) [2009] 2 CLJ 883 HC ***(refd)***

Richland Trade & Development Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1995] 1 LNS 206 HC ***(refd)***

Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn Bhd & Ors [1992] 1 LNS 41 HC ***(refd)***

Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd [2010] 2 CLJ 661 FC ***(refd)***

Supreme Finance (M) Bhd v. Mohamad Noor Yusuf & Ors [1993] 1 LNS 158 HC ***(refd)***

Tan King Hiang v. United Engineers (Singapore) Pte Ltd [2005] 3 SLR 529 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 7(1), (2), 38(1)(a), 92(1), (2), (3), 105(1)
Rules of the Court of Appeal 1994, rr. 4, 76
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

For the appellant - S S Muker (Daljeet Singh Sachdev with him); M/s Daljeet S Sachdev & Co
For the respondent - YS Cheah (M Menon with him); M/s Jaafar & Menon

[Appeal from High Court, Shah Alam; Bankruptcy No: 29-2098-1995]

Reported by S Barathi

JUDGMENT

Low Hop Bing JCA:

Notice Of Motion

[1] Pursuant to rr. 4 and 76 of the Rules of the Court of Appeal 1994 read with O. 18 r. 19(1)(b) or (d) of the Rules of the High Court 1980, the judgment creditor ("the JC") filed this notice of motion, seeking to strike out the appellant's ("the bankrupt's") two appeals, on the ground that the bankrupt has not obtained his discharge and is incompetent to maintain these appeals.

Factual Background

[2] The JC filed a bankruptcy notice for RM2,835,179.38 being the judgment sum obtained on 20 March 1990 against the bankrupt in Kuala Lumpur High Court Suit No. D1-22-145-1990.

[3] As a result of the bankrupt's failure to comply with the bankruptcy notice, the JC filed a creditor's petition against the bankrupt.

[4] On 28 September 2004, the JC served the creditor's petition on the bankrupt personally.

[5] On 28 February 2005, the bankrupt filed an application to strike out or set aside the bankruptcy notice, the service thereof and the creditor's petition (collectively, "the processes").

[6] On 8 January 2007, the learned Registrar dismissed the bankrupt's application with costs.

[7] On 12 January 2007, the bankrupt filed a notice of appeal to judge in chambers (encl. 26) against the learned Registrar's decision in refusing to set aside or strike out the processes.

[8] On 16 August 2007, the JC obtained from the Registrar an Adjudication Order and Receiving Order (AO & RO) against the bankrupt.

[9] On 22 August 2007, the bankrupt filed a notice of appeal to judge in chambers (encl. 29) against the AO & RO.

[10] On 11 March 2010, the learned High Court Judge dismissed both the appeals, *viz.* encls. 26 and 29. Hence, these appeals by the bankrupt.

Sanction Of Director General Of Insolvency (DGI)

[11] Learned counsel Mr YS Cheah (Mr M Menon with him) raised a preliminary objection and contended for the JC that the bankrupt has not obtained the previous sanction of the DGI pursuant to s. 38(1)(a) of the Bankruptcy Act 1967, and so the bankrupt is legally incompetent to maintain these two appeals. (A reference hereinafter to a section is a reference to that section in the Bankruptcy Act 1967). They sought support in:

(a) *Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 1 LNS 41 HC;

(b) *Re Chua Tin Hong ex parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174 HC;

(c) *Amos William Dawe v. Development & Commercial Bank (Ltd) Bhd* [1980] 1 LNS 133 FC;

(d) *Re Low Kok Tuan ex p Arab-Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185 HC;

(e) *Bathamani Suppiah v. Southern Finance Company Bhd* [2000] 2 CLJ 650 HC;

(f) *Supreme Finance (M) Bhd v. Mohamad Noor Yusuf & Ors* [1993] 1 LNS 158 HC;

(g) *Re Mat Sari Hamid ex parte United Asian Bank Bhd* [1993] 1 CLJ 202 HC; A

(h) *Richland Trade & Development Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1995] 1 LNS 206 HC;

(i) *Tan King Hiang v. United Engineers (Singapore) Pte Ltd* [2005] 3 SLR 529; B

(j) *Christopher Tan Kok Ching v. Bolhassan Di (No. 2)* [1998] 5 CLJ 177, HC;

(k) *M/s Laksamana Realty Sdn Bhd v. Goh Eng Hwa* [2004] 1 CLJ 274 CA; C

(l) *Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal* [2009] 4 CLJ 34 CA;

(m) *Re Lim Tai Nian, ex p Kewangan Utama Bhd* [2002] 1 CLJ 41 HC; D

(n) *Chin Sin Lan v. Delta Finance Bhd* [2002] 1 CLJ 266 HC;

(o) *Re Khoo Kim Hock* [1974] 1 LNS 134 HC; and E

(p) *Re Gan Wee Kuan, ex p Bank Bumiputra Malaysia Bhd, (Mentakab)* [2002] 5 CLJ 113 HC.

[12] Mr S S Muker (assisted by Mr Daljeet Singh Sachdev) submitted that these appeals were lodged pursuant to s. 92 for the purpose of challenging the bankruptcy orders made against the bankrupt and that the bankrupt was not maintaining an action involving third parties. Hence, no sanction was required. The following authorities were cited: F G

(a) *Re Khoo Kim Hock (supra)*;

(b) *Re Sebastion, ex p Metroplex Leasing & Credit Corp Sdn Bhd* [1989] 1 LNS 165 HC; H

(c) *Re Lim Tai Nian, supra*; and

(d) *Re Teoh Seow Chiew; ex p Ambank (M)* [2009] 2 CLJ 883 HC. I

[13] The above contentions bring about the following question for determination:

> On the basis of the above factual background, and upon a true construction of s. 38(1)(a), is the bankrupt who has not obtained the previous sanction of the DGI competent to maintain these two Appeals?

[14] I shall begin by looking at s. 92(1) on which the bankrupt-JD relies. It confers upon the court the power to "review, rescind or vary any order made by it under its bankruptcy jurisdiction."

Section 92(2) provides generally that "orders in bankruptcy matters shall, at the instance of **any person aggrieved**, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable" (emphasis added). The expression "any person aggrieved" may be construed to refer to the bankrupt himself, or his creditor(s) where eg, the debtor himself petitions for his own bankruptcy under s. 7(1) and (2), or even the DGI who shall be deemed to be aggrieved under s. 92(3).

[15] Section 38(1)(a) specifically regulates an undischarged bankrupt in the following words:

> **Undischarged Bankrupt**
>
> **38. Consequences of refusal of discharge**
>
> (1) Where a bankrupt has not obtained his discharge -
>
> (a) the bankrupt shall be incompetent to **maintain any action** (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency. (emphasis added)

Upon a true construction of s. 38(1)(a) and s. 92(1), (2) and (3), in the event of any inconsistency, as appears to be the case in these two appeals, I am of the view that the specific provisions of s. 38(1)(a) would prevail over the general provisions in s. 92(1), (2) and (3): *generalia specialibus non derogant*. That being the case, if the bankrupt wishes to invoke the provisions of s. 92, then the provisions of s. 38(1)(a) shall apply to him. It is therefore not surprising that counsel for the Official Assignee (now the DGI) had raised the s. 38(1)(a) point in *Re Khoo Kim Hock, supra*.

[16] The authorities cited for the bankrupt must now be considered, as follows: A

(a) *Re Khoo Kim Hock, supra*, concerns an undischarged bankrupt's application for an order annulling an Adjudication Order made under s. 92(1) and s. 105(1). Counsel for the Official Assignee (now the DGI) raised a preliminary objection on a point of law contending, *inter alia*, that an undischarged bankrupt was disabled from maintaining the application unless the prior sanction of the OA (now the DGI) was first obtained under s. 38(1)(a). Mohamed Azmi J (later FCJ) held, *inter alia*, that s. 38(1)(a) does not apply to an application under s. 92(1) and s. 105(1) where a bankrupt is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the OA is necessary. B C

(b) *Re Khoo Kim Hock, supra*, was followed by VC George J (later JCA) in *Re Sebastian, supra*; by Ian Chin J (as he then was) in *Re Lim Tai Nian, supra*; by Mohd Hishamudin J (now JCA) in *Re Teoh Seow Chiew, supra*; by Sulaiman Daud JC (now JCA) in *Chin Sin Lan, supra*; and by Ramly Ali J (now JCA) in *Re Gan Wee Kuan, supra*, respectively in dealing with the same preliminary issue under s. 38(1)(a). D E

[17] On the other hand, in *Re Low Kok Tuan, supra*, with the utmost respect, I did not follow *Re Khoo Kim Hock, supra*, as the applications were readily distinguishable. The matters before me in the High Court were applications for stay of bankruptcy orders and all ancillary and related proceedings, while the undischarged bankrupt's application in *Re Khoo Kim Hock, supra*, sought to annual bankruptcy orders under s. 92(1) and s. 105(1). Hence, I held that the previous sanction of the DGI was required in an application for a stay of bankruptcy orders. F G

[18] My judgment in *Re Low Kok Tuan, supra*, was followed in *Bathamani Suppiah, supra*, by PS Gill J (later FCJ) who at p. 652 e-f held that for an appeal against a bankruptcy order, sanction of the Official Assignee (now the DGI) should be obtained. His Lordship observed that *Re Khoo Kim Hock, supra*, "merely says that the prohibition of s. 38(1)(a) does not exclude a bankrupt from applying for a review etc. under s. 92(1) or s. 105(1), but the case is silent on the bankrupt's capacity to appeal, or for that matter to apply to stay proceedings, without H I

the sanction of the Official Assignee." Further down in the judgment, the learned judge noted that the "deliberate omission by the legislature in regard to appeals or stay in s. 92(1) and s. 105(1) would mean only one thing, that unlike provisions for review, rescinding, varying or annulling a bankruptcy order, for purposes of appeal against a bankruptcy order, sanction of the Official Assignee should be obtained." His Lordship held that "the appellant lacks the legal capacity to lodge the appeal."

[19] In so far as the requirement for the previous sanction of the DGI is concerned, judicial interpretations of s. 38(1)(a) in the aforesaid judgments of the High Court showed a patently divergent pattern. In my view, these High Court judgments must now be viewed in the light of the unanimous judgment of the Court of Appeal in *Sardar Mohd Roshan Khan & Another Appeal, supra*, where two core questions arose for determination, *viz*:

(a) The bankrupt's competency to maintain an action without the previous sanction of the DGI under s. 38(1)(a); and

(b) Whether an annulment order operates retrospectively?

[20] The Court of Appeal answered the aforesaid question (b) in the negative ie, an annulment order did not operate retrospectively. On appeal, the Federal Court reversed the position and held that the annulment order operated retrospectively: see *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd* [2010] 2 CLJ 661 FC at pp. 674 and 675 paras. 36, 37 and 39.

[21] However, it is significant to note that the Federal Court left open the issue of *locus standi* in the aforesaid question (a): see para. 41 of the Federal Court judgment at p. 675F-G. In the circumstances, the principles enunciated by the Court of Appeal relating to the requirement for sanction under s. 38(1)(a) remain intact. In delivering the judgment of the court (the other coram members being Sulong Matjeraie JCA and Ahmad Maarop JCA (now FCJ)), at pp. 43C to 45B, I took the opportunity to put in place the principles which were relevant to the true construction of s. 38(1)(a). The principles applicable to the instant appeals are:

(1) The word "action", which has not been defined in the Act, must be given its plain meaning ie, civil action or civil proceedings in court: per Augustine Paul JC (now FCJ) in *Re Chua Tin Hong ex parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174, which in turn referred to *Rex v. Kappaya* [1935] 1 LNS 70;

(2) Such civil action or proceedings include:

(a) The filing of a notice of appeal: *Amos William Dawe v. Development & Commercial Bank (Ltd) Bhd* [1980] 1 LNS 133 FC; *Re Low Kok Tuan ex p Arab-Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185, 189E HC; and *Bathamani Suppiah v. Southern Finance Co Bhd* [2000] 2 CLJ 650 HC;

(b) An application for stay of the bankruptcy proceedings: *Re Lai Hee Sang ex p Asia Commercial Finance (M) Bhd* [2000] 7 CLJ 302, 304;

(c) An application to set aside a default judgment upon which the bankruptcy proceedings are founded: *Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 1 LNS 41 HC; *Supreme Finance (M) Bhd v. Mohamad Noor Yusuf & Ors* [1993] 1 LNS 158 HC; and Re: *Mat Sari Hamid ex parte United Asian Bank Bhd* [1993] 1 CLJ 202, 203 HC;

(d) A counterclaim: *M/s Laksamana Realty Sdn Bhd v. Goh Eng Hwa* [2004] 1 CLJ 274;

(See also Khoo Kay Ping's "*The Law and Practice of Bankruptcy in Malaysia*" 2nd edn. p. 216);

(3) (not relevant)

(4) (not relevant)

(5) (not relevant)

(6) (not relevant)

(7) The requirement of sanction is not just a formality; it goes to his capacity: per Abdul Hamid Mohamad JCA (later CJ Malaysia) in *Goh Eng Hwa, supra*, CA at p. 281; and

(8) The steps taken by a bankrupt in civil action or proceedings without the previous consent of the OA in contravention of s. 38(1)(a) are null and void: *Goh Eng Hwa, CA, supra*; *Richland Trade & Development Sdn Bhd HC, supra*; and *Christopher Tan Kok Ching v. Bolhassan Di (No. 2)* [1998] 5 CLJ 177 HC.

[22] In the instant appeals, I am of the view that the steps taken by the bankrupt in filing and prosecuting these two appeals as adumbrated above clearly come within the ambit of maintaining an action in s. 38(1)(a) and so attract the application of the principles set out above in relation to s. 38(1)(a) ie, the requirement for the previous sanction of the DGI. My answer to the above question is therefore in the negative.

Conclusion

[23] On the foregoing grounds, I sustain the JC's preliminary objection. The bankrupt's two appeals are struck out with no order as to costs. The decision of the High Court is affirmed. Deposit to the DGI.

[24] My learned brother Abu Samah Nordin JCA has read my judgment in draft and has expressed his agreement to make it the majority judgment of the court.

Anantham Kasinather JCA:

Background Facts

[25] The respondent filed the bankruptcy notice for the sum of RM2,835,179.38, having obtained judgment on 20 March 1990 for this sum against the appellant. The respondent then filed a creditors petition against the appellant arising from the appellant's failure to comply with the bankruptcy notice. The creditors petition was served on the appellant on 28 September 2004. On 28 February 2005, the appellant filed an application (enc. 18) to strike out/set aside the bankruptcy notice, service of the bankruptcy notice and creditors petition. On 8 January 2007, the learned Deputy Registrar dismissed enc. 18. On 12 January 2007, the appellant filed the notice of appeal to the judge in chambers (enc. 26) against the decision of the learned Deputy Registrar. On 16 August 2007, an Adjudicating Order and Receiving Order ('AO' and 'RO') was made against the appellant. On 22 August 2007, the appellant filed the notice of appeal to the judge in chambers against the decision of the learned Senior Assistant Registrar in granting the AO and RO (enc. 29). On 11 March 2010, the learned High Court Judge dismissed encls. 26 and 29. The present appeal is in respect of the orders of the High Court dismissing encls. 26 and 29. In respect of this appeal itself, the respondent filed the motion to strike out the notice of appeal

pursuant to rr. 4 and 76 of the Rules of the Court of Appeal 1994. The basis for the motion is that the appellant has no locus to pursue this appeal by reason of the provisions of s. 38(1)(a) of the Bankruptcy Act 1969 (the said Act).

[26] Section 38(1)(a) of the said Act reads as follows:

> Where a bankrupt has not obtained his discharge -
>
> (a) The bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

Counsel for the respondent in his written submission referred to a passage in the judgment of Siti Norma Yaakob J (as Her Ladyship then was) as authority for the proposition that a bankrupt cannot commence any form of proceedings other than an action for damages for injury to his person or when he challenges his status by filing an application under s. 92(1) or s. 105(1) of the Bankruptcy Act (see *Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 1 LNS 41; [1992] 2 MLJ 588 at p. 590). Counsel for the appellant conceded that the word 'action' has not been defined in the said Act. Counsel cited the passage in the judgment of His Lordship Augustine Paul JC (as His Lordship then was) and submitted that the meaning of the word 'action' was confined 'in its operation to civil proceeding in court and not to conveyance of property as in the appeal before me' (see *Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174 at p. 179).

[27] In my judgment, the pronouncements of Her Ladyship Siti Norma and Justice Augustine Paul in the aforesaid two cases do not afford a basis for the respondent's motion. In the case of *Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn Bhd*, the principles of law enunciated by Azmi J (as His Lordship then was) in the authoritative decision of the court in *Re Khoo Kim Hock* [1974] 1 LNS 134 were not considered by the court. With respect, the pronouncements of Augustine Paul JC in the case of *Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174, do not advance the respondent's motion since the facts of the case involved an attempted conveyance by the bankrupt of land of which he was the registered proprietor. It is trite law that upon the making of the AO and RO, the property of the bankrupt vest in the Official Assignee.

[28] In my judgment, the outcome of the respondent's motion should be decided by the *ratio* in the case of *Re Khoo Kim Hock*. His Lordship Mohamed Azmi J (as His Lordship then was) when dealing with the issue of sanction under s. 38(1)(a) of the said Act had this to say:

> The first question for determination is whether the requirement of sanction of the Official Assignee under s. 38(1)(a) applies only to a bankrupt's ordinary claims, ie, maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is challenging the very validity of the adjudication order by which he has been adjudged bankrupt. Having considered the provisions of the Bankrupt Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The exception contained within brackets in section 38 (1)(a) clearly indicates that the section is intended to apply only to actions for recovery of something – either real or personal – which can be turned into assets such as a claim for recovery of property or money due. Further, there is nothing in sections 33, 92 or 105 to indicate that it is the intention of the legislature to require prior sanction of the Official Assignee before a bankrupt can seek relief under those provisions. Under section 33(1), a bankrupt may at any time after being adjudged bankrupt apply to the Court for an order of discharge, and there is no legal requirement that for this purposes he should first obtain the sanction of anyone. This is also the case where an application is made to the Court under sections 92(1) and 105(1) of the Act. It is true that section 24(4) provides that when a debtor is adjudged bankrupt his property shall become divisible amongst his creditors and shall vest in the Official Assignee. The word 'property' is defined by section 2 to include 'money, goods, things in action, land an every description of property, whether real or personal, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined'. As such, only property as defined above would vest in the Official Assignee at the time of adjudication, and from the definition, unless something can be turned into an asset for payment of debts to the creditors it cannot be described as property within the meaning of section 2. The present application being not things in action or chose in action cannot be described as something which

can be turned into asset for the estate of the bankrupt. The expression 'chose in action' or 'things in action' in the literal sense has been described to mean a thing recoverable by action as contrasted with the chose in possession, namely, a thing of which a person has not only ownership but also actual physical possession. The meaning of the expression has varied from time to time, but it is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is used in respect of both corporeal and incorporeal personal property which is not in possession. (see Words and Phrases Legally Defined Volume I). Under the circumstances, the case of K. Ismail Ganey Rowther referred to above is no authority for the proposition that an undischarged bankrupt in Malaysia is disabled from making the present application without the previous sanction of the Official Assignee. In that case, where the Court had considered section 33(i)(a) of the Bankruptcy Enactment 1912, which is the forerunner of our present section 38(1)(a), Thorne A-G CJ rightly did not accept the proposition that the words 'without the previous sanction of the Official Assignee" mean that if the bankrupt received the sanction of the Official Assignee he could maintain an action in respect of any property of any kind whatsoever which was in his order and disposition at the time of the bankruptcy. In his view, the legislature did not intend, and the section did not mean that by his sanction the Official Assignee can divest himself of the property either real or personal, which is vested in him by the receiving order or under an order of adjudication and revest that property in the bankrupt for the purpose of bringing an action. It is therefore clear that the legal proposition as expounded by Thorne A-G CJ is only confined to the property of a bankrupt which is vested in the Official Assignee. In my view, since the present application does not come within the meaning of 'property' as defined by section 2, it does not vest in the Official Assignee, and as such it is not necessary for the bankrupt to obtain the prior sanction of the Official Assignee. I am fortified in this conclusion by *Halsbury*, volume 3, Fourth Edition, at paragraphs 556 and 558. Paragraph 556 provides that the rights of claims which the trustee may enforce by action, or in respect of which he may be liable as representing the estate, fall into two classes, namely (1) actions which at the commencement of the bankruptcy are pending by or against the bankrupt, and (2) rights of action which are vested in the bankrupt at the commencement of the bankruptcy, or which

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devolve on the bankrupt before he obtains his discharge. In the present case, we are only concerned with the latter class, and at paragraph 558 *Halsbury* has this to say:

> The rights falling under the second class may be enforced by action by the trustee, unless the cause of action is one which from its nature does not vest in the trustee, or to the benefit of which the estate is not entitled, such as rights of action in respect of personal damage or injury …

Accordingly, just as right of action in respect of personal damage and injury (which is excluded under section 38(1)(a) from prior sanction) is a cause of action to the benefit of which the estate is not entitled, the application in the present case is one which from its nature does not vest in the Official Assignee. Under the circumstances, I hold that section 38(1)(a) does not apply to an application under sections 92(1) and 105(1) of the Bankruptcy Act, where a bankrupt is seeking the Court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the Official Assignee is necessary in the present case.

[29] Counsel for the appellant does not challenge the correctness of either the decision or the reasoning of Azmi J in *Re Khoo Kim Hock*. However, counsel for the appellant submitted that the ratio of the decision in *Re Khoo Kim Hock* is only applicable when the bankrupt is applying to annul the AO and RO pursuant to an application under s. 92(1) or 105(1) of the Bankruptcy Act. This submission of counsel has the support of the decision of the High Court in the case of *Re Low Kok Tuan ex p Arab-Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185. Justice Low Hop Bing (as His Lordship then was) when dealing with an application by the bankrupt for a stay of the creditors petition pending disposal of an appeal to the judge in chambers opined to the following effect:

> In my judgment, it is trite law that upon a person being adjudged a bankrupt, all his affairs become vested in the Official Assignee: Section 38(1)(a), Bankruptcy Act 1967 ('the Act'). This prohibition no doubt excludes an application by an undischarged bankrupt seeking an order of the Court under ss. 92(1) and 105(1) of the Act to review, rescind or vary any order made by it: *Re Khoo Kim Hock supra*. The question before me is whether the principle in *Re Khoo Kim Hock supra*, applies to the facts of the instant case. *Re Khoo Kim Hock supra* revolves around an undischarged bankrupt's application to annul bankruptcy orders under ss. 92(1) and 105(1) of the Act. A quick look at the headnote of that case is sufficient to demonstrate that it has absolutely no application to the facts of the instant case. Enclosure (17) herein and, for that matter, Encl. (13) are not applications seeking an order to annul bankruptcy orders, but are applications

> for a stay of the bankruptcy orders and all ancillary and related proceedings. Accordingly, *Re Khoo Kim Hock* is of no assistance to the appellant in Encl., (17). That being the case, I hold that the appellant lacks the legal capacity to lodge this appeal against the decision of the Deputy Registrar who has refused the Appellant's application for stay of the Creditor's petition and all ancillary and related proceedings.

[30] With respect, in my judgment, there is no justification for limiting the *ratio* of the judgment of the court in *Re Khoo Kim Hock* to applications under s. 92(1) and 105(1) of the Bankruptcy Act only. His Lordship Azmi J expressly stated in the judgment of the court that it was His Lordship's considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion, to review, rescind or vary any order made by it under its bankruptcy jurisdiction. His Lordship further pronounced that:

> the exception contained within brackets in Sec. 38(1)(a) clearly indicates that the section is intended to apply to actions for recovery of something either real or personal – which can be turned into assets such as a claim for recovery of property or money due.

His Lordship then explained that the test as to whether the bankrupt required the sanction of the court should be determined on whether the application involved "property" as defined by s. 2 of the said Act. The rationale for this test being that if the application involved, property as defined in the Act, then, to the extent that the property vested in the Official Assignee, by reason of the applicant being a bankrupt, the prior sanction of the Official Assignee was necessary. In all other cases, the sanction of the Official Assignee was not necessary. His Lordship fortified his conclusion by a passage in *Halsbury* that the sanction of the trustee is not necessary in cases where the cause of action is one which from its nature does not vest in the trustee or to the benefit of which the estate is not entitled, such as rights of action in respect of personal damage or injury. Applying the aforesaid test to the application before His Lordship in the case of *Re Khoo Kim Hock*, His Lordship ruled that applications under ss. 92(1) and 105(1) of the Bankruptcy Act do not require the previous sanction of the Official Assignee.

[31] With utmost respect, I cannot agree with the decision of His Lordship Justice Low Hop Bing because His Lordship without applying the test propounded by Azmi J ruled that the decision in *Re Khoo Kim Hock* only applied to applications by the bankrupt under ss. 92(1) and 105(1) of the Act. In my judgment, the test propounded by Azmi J when properly applied as was the case in the judgment of the court in *Re Lim Tai Nian ex p Kewangan Utama Bhd* [2002] 1 CLJ 41 allows a bankrupt to apply for stay or appeal against orders in bankruptcy matters without the sanction of the Official Assignee. In this case, the application before the court was whether a bankrupt could appeal against an order making him a bankrupt without the prior sanction of the Official Assignee. His Lordship Ian Chin (as His Lordship then was) pronounced his opinion on the implications of the decision of Azmi J on the application before him in this manner:

> Clearly then, on the authority of *Re Khoo Kim Hock* an appeal by an undischarged bankrupt is not caught by s. 38(1) and therefore no prior sanction of the Official Assignee is required. Section 92 is in substance the same as the English s. 108 where the bankrupt *In re Baron* was able to appeal without any sanction. Now s. 92 is not concerned only with adjudication orders only but with "order made … under its bankruptcy jurisdiction" and "orders in bankruptcy matter". The plain and simple meaning of those terms would include, for example, order of stay or refusal of stay or order of extension or refusal of extension of time to do sometime. Therefore, I am unable to agree with *Re Low Kok Tuan* which, though it did not disagree with *Re Khoo Kim Hock*, decided that an undischarged bankrupt cannot appeal against an order refusing a stay of the bankruptcy petition. After all, the right to appeal is not a chose in action that can be vested in the official assignee as said in *Re Khoo Kim Hock*. For those reasons too, I am unable to agree with *Bathamani*. At the hearing of the bankruptcy petition, the Official Assignee is required to state whether the supports the making of a receiving and adjudication order and if the papers are in order, he would invariably support the making of such an order. It would be perverse to expect him to sanction an appeal against the very order which he had supported. Therefore, it is unthinkable that he would give his sanction and this means that a bankrupt can never appeal against an order made against him, no matter if there is injustice in the making of the order. Such a construction of the law should not be had. For that reason too I am unable to agree with the said two decisions. Therefore, I am of the view that an undischarged bankrupt has a right to appeal against any order made by the Court in exercise of its bankruptcy jurisdiction and he need not apply for any prior sanction before doing so.

[32] In my judgment, the test propounded by Azmi J when properly applied enables a bankrupt to challenge all orders made by a bankruptcy court in the exercise of its bankruptcy jurisdiction including appeals as in this case and even applications to set aside a judgment forming the subject matter of the bankruptcy proceedings without the need to obtain the sanction of the Official Assignee. For the last proposition, I wish to adopt the reasoning behind the judgment of Sulaiman Daud JC (as His Lordship then was) in the case of *Chin Sin Lan v. Delta Finance Bhd* [2002] 1 CLJ 266. Accordingly, I dismiss the motion.

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